IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all other persons similarly situated,
Appellant,

v.

ROGER G. REDHAIL, individually and on behalf of all other persons similarly situated,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin is reported as *Redhail v. Zablocki*, 418 F. Supp. 1061 (1976), and is included in the appendix to the jurisdictional statement at page 1.

JURISDICTION

This is an action for declaratory and injunctive relief brought under the Civil Rights Act, 42 U.S.C. §1983, by the appellee as an individual and on behalf of all persons similarly situated against the named defendant who is the Milwaukee County clerk and against all such persons similarly situated. Jurisdiction of the district court was invoked under 28 U.S.C. §1343(3). A three-judge district court was convened and a final order of that court granting declaratory and injunctive relief was entered on August 31, 1976.

The statutory provision conferring jurisdiction on this court to review the judgment by direct appeal is 28 U.S.C. §1253.

Cases sustaining the jurisdiction of the court to hear the appeal are *Goldstein v. Cox*, 396 U.S. 471 (1970), and *Wyman v. Rothstein*, 398 U.S. 275 (1970).

CONSTITUTIONAL PROVISION INVOLVED

Article XIV, Section 1, Amendments to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

WISCONSIN STATUTE INVOLVED

Section 245.10(1), (4) and (5), Wis. Stats.

> "**245.10 Permission of court required for certain marriages.** (1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown, and, if the minor issue were of a prior marriage, unless a 5-day notice thereof is given to the family court commissioner of the county where such permission is sought, who shall attend such

hearing, and to the family court commissioner of the court which granted such divorce judgment. If the divorce judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding under s. 52.37 or divorce action of such person in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting such marriage is filed with said county clerk.

* * *

(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

(5) This section shall have extraterritorial effect outside the state; and s. 245.04(1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere."

QUESTIONS PRESENTED

1. Is a state statute which requires a marriage applicant, having minor issue not in his custody and which he is under an obligation to support, to show to a court that such issue was not then or likely thereafter to become a public charge violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Answered by the three-judge court in the affirmative.

2. Where a state has legitimate and substantial interests in regulating domestic relations of its residents, should the abstention doctrine be applied requiring the dismissal of the complaint filed in a federal district court?

Not answered by the three-judge court.

3. Does due process require a notice to members of a class if the judgment is to be binding upon them?

Answered by the three-judge court in the negative.

STATEMENT OF FACTS

In January of 1972, a paternity action was commenced in the County Court, Civil Division, of Milwaukee County, Wisconsin, against appellee Roger G. Redhail in which it was alleged that he was the father of a baby girl born out of wedlock on July 5, 1971. On February 23, 1972, Redhail appeared and admitted that he was the father of the child. On May 12, 1972, Redhail was adjudged the father of the child born on July 5, 1971, and was ordered to pay $109 per month as support for the child until she reached eighteen years of age, and was also ordered to pay court costs.

At the time of his admission of paternity, Redhail was a minor and a high school student. From May of 1972 until August of 1974, he was unemployed, indigent, and unable to pay any support obligation. No payments were, therefore, made, and as of December 24, 1974, there was an arrearage in excess of $3,732.

Redhail's child has been a public charge since her birth and is currently receiving benefits under the Aid to Families with Dependent Children ("AFDC") program in excess of $109 per month.

On September 27, 1974, Redhail filed an application for a marriage license with appellant Thomas E. Zablocki. Zablocki is the County Clerk of Milwaukee County and is responsible for the issuance of marriage licenses in Milwaukee County pursuant to §245.05, Wis. Stats. On September 30, 1974, an agent of Zablocki denied Redhail's application for a marriage license and refused to issue a marriage license because Redhail failed to comply with §245.10(1), Wis. Stats., in that he did not have a court order granting him permission to marry.

The complaint in this action was filed on December 24, 1974. Since a permanent injunction restraining the enforcement of a state statute was requested, the action was one requiring a three-judge district court, 28 U.S.C. §2281. Designation of a three-judge court was requested, and on January 6, 1975, the Chief Judge of the Seventh Circuit entered an order designating this three-judge court pursuant to 28 U.S.C. §2284. Appellant subsequently filed his answer. Notice was given to the governor and the attorney general pursuant to 28 U.S.C. §2284(2).

On February 18, 1975, appellee filed a motion for a class action. The motion sought to have the action maintained as a class action on behalf of all Wisconsin residents subject to the provisions of §245.10(1) and against a class consisting of all the county clerks within Wisconsin. By order dated February 20, 1975, Judge Reynolds ordered that the action proceed as a class action pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, on behalf of a class of plaintiffs defined as follows:

> "All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to §245.10(1), Wis. Stats. (1971)."

The members of the appellant class of county clerks were never given notice of the pendency of the action. No notice, either individual or otherwise, was directed at the appellee class in this proceeding (Jurisdictional Statement, Appendix, Page 7).

SUMMARY OF ARGUMENT

The three-judge court of the United States District Court of the Eastern District of Wisconsin extended and applied the compelling governmental interest test articulated in *Shapiro* to a statutory marriage requirement. In absence of racial classification or invasion of marital privacy, application of this stringent test is not justified lest marriage restrictions as to age or having another spouse are to be held violative of equal protection. *Sousna* has declared the area of domestic relations to be traditionally within the scope of state regulation.

Because of *Sousna*, the district court should have stayed its hand under the abstention doctrine developed in *Reetz* and *Pursue* in absence of a compelling reason to accept jurisdiction over a case involving marriage or domestic relations.

The district court erred in not requiring notice to be sent to the defendant class before its decision as mandated by *Eisen*.

ARGUMENT

I. The Classification Created By Sec. 245.10(1), Wis. Stats., Complies With The Requirements Of Equal Protection.

A. Eligibility requirements for marriage should be viewed in the light of a reasonable relationship test.

This court has consistently indicated that domestic relations have always been subject to control of the state legislature. In *Maynard v. Hill*, 125 U.S. 190, 205 (1888), the court observed:

> "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure of form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution."

In *Sousna v. Iowa*, 419 U.S. 393, 404 (1975), the court stated:

> "The durational residency requirement under attack in this case is a part of Iowa's comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact. In Barber v. Barber, 21 How. 582, 584, 16 L. Ed. 226 (1859), the Court said: 'We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce . . . .' In Pennoyer v. Neff, 95 U.S. 714, 734-735, 24 L. Ed. 565 (1878), the Court said: 'The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved,' and the same view was reaffirmed in Simms v. Simms, 175 U.S. 162, 167, 20 S. Ct. 58, 60, 44 L. Ed. 115 (1899)."

In view of the foregoing judicial backdrop expressed in the *Maynard* and *Sousna* cases, *supra*, it is submitted that application of equal protection to a statutory classification should be measured by the traditional reasonable relationship test. As stated in *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 214, 215 (1920):

> "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Section 245.10, Wis. Stats., was part of the revision of the Family Code introduced by the Wisconsin Legislative Council in the form of Bill No. 151A and enacted into law by the 1959 Legislature. Extensive notes were imprinted upon the bill which were before the Legislature in its deliberations. Note fourteen following proposed sec. 245.10 states: "This new provision is designed to cover a situation where a person who is about to assume new marital responsibilities has failed to fulfill the obligation of a prior marriage. In such a case judicial approval must be attained. This gives the judge and the family court commissioner an opportunity to emphasize the responsibility of support of the present family before new obligations are incurred."

This statute was expanded in 1963 to require a showing by a marriage applicant to a court that his minor children who are not in his custody and to whom he owes an obligation of support are not public charges or likely to become public charges. In determining that this statute does not have an extraterritorial effect, the Wisconsin Supreme Court in *State v. Mueller*, 44 Wis. 2d 387, 395, 171 N.W. 2d 414 (1969), noted:

> ". . . . the interest Wisconsin seeks to protect is a legitimate and substantial protectable interest of this state both as to the protection of the welfare of its minors and the marriage relationship of its residents . . ."

It should be apparent that the principal governmental interest is in the welfare of children of a marriage applicant, that provision for such children should be accommodated before new marital obligations are undertaken.

While Wisconsin residents who have minor children not in their custody whom they are under an obligation to support are under a burden in obtaining a marriage license, there is a rational reason for the classification. As stated by the court in *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961):

> "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . ."

B. The three-judge court erred in applying a compelling interest standard.

1. Characterization of marriage as a fundamental right should not invoke the compelling interest test.

In its decision, the three-judge court found that the classification of sec. 245.10, Wis. Stats., placed a substantial burden on the ability of persons in the

appellee's class to marry. The court reasoned that since a fundamental right was involved, the classification was subject to strict scrutiny requiring the showing of a compelling governmental interest.

There has been only one case before this court involving marriage eligibility requirements. That case involved a prohibition of intermarriage between whites and non-whites. *Loving v. Virginia*, 388 U.S. 1 (1967). Because the miscegenation statute in question rested solely upon distinctions drawn according to race, the case is not particularly helpful with the respect to the matter *sub judice*. The compelling state interest requirement had not yet emerged.

The "compelling interest" doctrine was articulated more explicitly than ever before in *Shapiro v. Thompson*, 394 U.S. 618 (1969). It should not be extended to the domestic relations field. In commenting that a classification which affects a fundamental right can only be justified by the compelling interest test, Justice Harlan's dissent in *Shaprio, supra*, 394 U.S. 661-662 is instructive:

> "I think this branch of the 'compelling interest' doctrine particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights. This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental matters as the right to pursue a particular occupation, the right to receive greater or smaller wages or to work more or less hours, and the right to inherit property. Rights such

as these are in principle indistinguishable from those involved here, and to extend the 'compelling interest' rule to all cases in which such rights are affected would go far toward making this Court a 'super-legislature.' This branch of the doctrine is also unnecessary. When the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test."

There can be no doubt that the compelling interest test is a result-oriented concept. What asserted interests are compelling enough in any marriage requirement? Traditionally, states have established requirements relating to age, blood tests, competency, solemnization and fees. States have traditionally prohibited marriage between next-of-kin or by a person already having a spouse. It is submitted that all or any of such requirements could be struck down as violative of equal protection if the compelling interest test of the *Shapiro* case were to be extended. It is significant that this court did not extend the Shapiro doctrine in upholding Iowa's one-year durational residency requirement for divorce in the *Sousna* case, *supra*.

2. The classification created by sec. 245.10, Wis. Stats., does not involve suspect criteria so as to invoke the compelling interest test.

The three-judge court erred in assuming that sec. 245.10, Wis. Stats., created a classification based on wealth. On its face, sec. 245.10, Wis. Stats., does not create any classification based on wealth. It applies generally to rich and poor alike. That it may affect persons differently does not constitute invidious discrimination. Such a result flows directly from the economic system, not the law. The law merely withholds issuance of a license to remarry until a showing that obligations incurred from the first marriage are met. The state's substantial interest in protecting the children of non-custodial parents provides more than a reasonable basis for the statutory classification involved. The district court's application of the strict scrutiny test under the circumstances of this case ignores the traditional standard for applying equal protection in cases involving social and economic regulation under *San Antonio Ind. School District v. Rodriguez*, 414 U.S. 1 (1973) and in *Dandridge v. Williams*, 397 U.S. 471 (1970).

It would be rigid sophistry to view the case at bar as involving simply the right to marry in the abstract. It is the right to marry where the applicant already has minor children to support. The right to marry per se is not involved. The state's interest in the children of the applicant is correspondingly stronger than it would be if the right to marriage were simply involved. It is the interest in the children of a marriage applicant that must be measured against his interest in marriage or remarriage. While the Equal Protection Clause prohibits states from discriminating between rich and poor as such in the formulation and application of their laws, it is a far

different thing to suggest that equal protection prevents a state from adopting a law of general applicability that may affect poor persons differently than it does those who are more wealthy. ". . . At least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *San Antonio Ind. School District v. Rodriguez, supra*, 414 U.S. 24. "Ability to pay should not be confused with opportunity to pay." *Llamas v. Department of Transportation*, 320 F. Supp. 1041, 1044 (E.D. Wis. 1969).

II. The Court Below Should Have Abstained.

Even though a federal equity court has jurisdiction of a particular proceeding, it may, in its sound discretion, refuse to enforce or protect legal rights where the exercise may be prejudicial to the public interest as a proper regard for the independence of state governments in carrying out their domestic policy. *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-318 (1943). Abstention has been deemed to be proper in a Civil Rights case. *Harrison v. NAACP*, 360 U.S. 167 (1959).

The doctrine of federalism set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and extended to civil proceedings in *Huffman v. Pursue*, 420 U.S. 592 (1975), was not considered by the district court in the case at bar. There are probably as many different marriage requirements as there are states. The regulation of marriage is, of course, purely a state function. As evidence of the limitation of the federal judiciary to survey state statute books under the Fourteenth Amendment, one need look no further than the *Younger* doctrine. There is a correlative principle implicit in the federal-state relationship applicable to the instant case. Under *Reetz v. Bozanich*, 397 U.S. 82 (1970), it was announced that a federal court, in the interest of comity should stay its hand where the issue of

state law is constitutionally uncertain, and where no opportunity had been afforded to state courts for review. Accordingly, it is suggested that the district court should have required the appellee to repair to the state court in the traditional state area of marriage regulation and in view of the fact that a Wisconsin state court has had no opportunity to decide the question of the constitutionality of sec. 245.10, Wis. Stats. In this connection, the Wisconsin Supreme Court in *State v. Mueller, supra*, carefully noted:

> "There is no claim here that the statutes violate any specific provision of the United States Constitution or the Wisconsin Constitution, only that Wisconsin cannot constitutionally regulate or punish for acts done outside its territorial boundaries." 44 Wis. 2d 391.

Because there is nothing patently unconstitutional about sec. 245.10, Wis. Stats., on its face, see *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the abstention doctrine should have been applied to this case in light of *Sousna v. Iowa, supra.*

III. The Three-Judge Court Erred In Establishing A Defendant Class Without Requiring A Notice To Members Of Such Class.

This action was commenced on behalf of a plaintiff as a class action. It also named a county clerk as a defendant and all other persons similarly situated. There are 72 counties and clerks thereof in the state of Wisconsin (1975 Bluebook, pages 664-665). No notice was required by the court nor was any notice ever given to members of this class prior to the decision of the three-judge court. After its decision, the court ordered:

"That defendant Thomas E. Zablocki, the class he represents and their officers, agents, servants, employes and their successors and those persons in act of concert or participation with them who receive actual notice of this judgment are hereby permanently enjoined from denying applications for marriage licenses on the grounds that the applicant has failed to comply with the provisions of sec. 245.10(1), Wisconsin Statutes (1973).

"IT IS FURTHER ORDERED that defendant Thomas E. Zablocki mail a copy of this opinion and order of the judgment to all members of the class he represents." (Jurisdictional Statement, Appendix, pages 17-18.)

It is submitted that the granting of declaratory and injunctive relief against the class violates the mandatory requirements of Rule 23(c)(2), requiring that:

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort . . ."

In *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173-179 (1974), this court clearly required that individual notices be sent, at plaintiff's expense, to all identifiable class members. There was no onerous burden involved in advising 72 county clerks of this action before the decision was made. The class is not so numerous as to preclude such notice. The members of this class are easily identifiable. It

is submitted that due process requires such notice if the judgment is to be binding upon them in light of *Eisen v. Carlisle and Jacquelin, supra.*

CONCLUSION

"Some measure of judicial restraint is the price of preserving the tripartite form of government of our democratic republic." *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 564, 185 N.W. 2d 306 (1971).

Appellant respectfully urges that the judgment of the United States District Court for the Eastern District of Wisconsin be reversed.

Respectfully submitted,

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